

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID PAUL MCCAWE,

Defendant-Appellant.

UNPUBLISHED

October 4, 2007

No. 270197

Gratiot Circuit Court

LC No. 05-005126-FH

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

A jury convicted defendant of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years old), and the trial court sentenced defendant to a prison term of twenty to 180 months. Defendant appeals as of right. We affirm.

Defendant first argues that because MCL 768.27a conflicts with MRE 404(b)(1), it unconstitutionally infringes on our Supreme Court's rule-making authority. In other words, defendant argues that the statute violates the separation of powers doctrine. This argument was recently rejected by this Court in *People v Pattison*, ___ Mich App ___; ___ NW2d ___ (Docket No. 276699, issued September 11, 2007), slip op pp 3-4. *Pattison* observed that MCL 768.27a "reflects the Legislature's policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavior history and view the case's facts in the larger context that the defendant's background affords." *Id.* at slip op pp 3-4. *Pattison* reasoned that although the Michigan Constitution prohibits the Legislature from enacting laws that are purely procedural with respect to judicial functions,¹ because "MCL 768.27a is substantive in nature, . . . it does not violate the principles of separation of powers." *Id.* at slip op p 4.

Defendant next argues that MCL 768.27a took effect after the alleged incident occurred and, therefore, it is an unconstitutional ex post facto law² as applied to defendant. Again, *Pattison*, *supra* at slip op p 3, rejected an identical argument. The Court noted that a law that lowered the quantum of evidence necessary for a conviction from what existed at the time of the

¹ Const 1963, art 6, § 5.

² US Const, art 1 § 10; Const 1963, art 1, § 10.

offense would violate ex post facto protections, *id.*, but concluded that MCL 768.27a did not change “the standard for obtaining a conviction.” *Id.*³

Defendant also argues that because the trial court scored offense variables (OVs) 10 and 13 based on facts that were not found by a jury, the trial court violated his Sixth Amendment⁴ right to a jury trial because, as set forth in *Blakely v Washington*, 542 US 296, 305; 124 S Ct 2531; 159 L Ed 435 (2000), a sentencing court cannot increase a defendant’s maximum sentence based on facts that were not found by a jury. However, as defendant concedes, our Supreme Court has held that *Blakely* does not apply to Michigan’s sentencing guidelines. *People v McCuller*, ___ Mich ___; ___ NW2d ___ (Docket No. 128161, decided July 26, 2007); *People v Drohan*, 475 Mich 140, 159-162; 715 NW2d 778 (2006).

Defendant finally argues the trial court violated the rule of *Blakely* because under MCL 769.34(4)(a), he would have received an intermediate sanction of no more than 12 months in jail instead of a prison sentence absent the alleged scoring error. However, our Supreme Court has rejected this argument and held that when the sentencing guidelines call for a minimum intermediate sanction, the sentencing court can depart from the intermediate sanction by considering factors not found by the jury, reasoning that “because Michigan has a true indeterminate sentencing scheme, an intermediate sanction is not a maximum sentence that is governed by *Blakely*.” *People v Harper*, ___ Mich ___; ___ NW2d ___ (Docket Nos. 130988, 131898, decided July 26, 2007).

Affirmed.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

³ Moreover, *Pattison* noted that the defendant could have been tried and convicted before MCL 768.27a was enacted solely on the basis of the victim’s proposed testimony. *Pattison, supra* at slip op p 3. Similarly, the complainant’s testimony in the present case that defendant touched him between his legs and kissed him repeatedly would have been legally sufficient to support defendant’s conviction.

⁴ US Const, Am VI.